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No. 05-983

In The Supreme Court of the United States

JACOB WINKELMAN, ET AL.,

Petitioners,

v.

PARMA CITY SCHOOL DISTRICT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE EQUAL JUSTICE FOUNDATION, THE OHIO LEGAL ASSISTANCE FOUNDATION, AND THE OHIO LEGAL RIGHTS SERVICE AS *AMICI CURIAE* SUPPORTING THE PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae, the Equal Justice Foundation ("EJF") is an Ohio-based nonprofit organization that represents the poor and disadvantaged who may otherwise not have access to the legal system. It undertakes class-action and other impact litigation on behalf of individuals with disabilities, minorities, immigrants, children, the aging, victims of predatory lending and consumer fraud, tenants denied their rights, and institutionalized persons.

Amicus curiae, the Ohio Legal Assistance Foundation ("OLAF"), is a nonprofit entity committed to ensuring equal access to justice by providing legal representation, resources, programs, and services throughout the State of Ohio to serve the unmet civil legal needs of the State's poor. Integral to that mission, OLAF seeks to ensure that individuals and families have access to all of Ohio's courts, whether through paid or *pro bono* counsel.

Amicus curiae, the Ohio Legal Rights Service ("OLRS") is an independent state agency chartered at Ohio Revised Code § 5123.60 to protect and advocate for the rights of people with disabilities. OLRS has been designated by the Governor of Ohio as the protection and advocacy system ("P&A") under federal law for people with disabilities in Ohio. *See* 42 U.S.C. § 10541 *et seq.* Under both state and federal law, OLRS investigates abuse, neglect, and rights violations affecting people with disabilities, and pursues administrative, legal, and policy

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[1] Pursuant to S. Ct. R. 37.6, *amici* state that no counsel to a party authored this brief in whole or in part and that no person other than the *amici curiae* and their members made a financial contribution toward the preparation and submission of this brief. Letters reflecting the consent of the parties have been lodged with the Court.

remedies to those violations. As the P&A for Ohio, OLRS has extensive experience representing children with disabilities in special education cases before administrative bodies and in federal court. The National Disability Rights Network (a membership organization of P&As from around the nation) and the Kentucky, Tennessee, and Michigan P&As (as P&As from the Sixth Circuit) have also filed an amicus brief in this case. OLRS recognizes that this case has implications for every Ohio child with a disability and their parents, and therefore joins in this brief with other Ohio-based civil justice groups while supporting the position taken by the other P&A *amici*.

Amici share a common interest in this case: If resources are not sufficient to provide representation, then it is imperative that those unable to afford or to obtain counsel can access the courts and prosecute their claims *pro se*. *Amici* share a further concern over the limited legal representation available to children with disabilities and their parents under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, and in whether the holding of the Sixth Circuit deprives those families of the constitutionally enshrined right to due process.

SUMMARY OF THE ARGUMENT

The IDEA expressly places parents in charge of their children's procedural and substantive rights to a free appropriate public education ("FAPE"). At the heart of the IDEA are its procedural "safeguards" and, most fundamentally, the right of *parents* to contest decisions by school boards that deny their children an effective educational

opportunity. *See* 20 U.S.C. § 1415(a). The IDEA empowers parents to advance those rights both by initiating administrative hearings to determine the most appropriate education and by filing suit to review adverse administrative decisions. Despite this grant of statutory authority, the Sixth Circuit has held that parents may not jointly represent themselves and their child with a disability in a suit in federal court. EJF, OLAF, and OLRS anticipate that petitioner and other *amici* will thoroughly brief this Court on how the Sixth Circuit's holding is contrary not only to the language and purpose of the IDEA, but also to the general right of self-representation. *See* 28 U.S.C. § 1654 (permitting individuals to "plead and conduct their own cases personally").

Beyond undermining the IDEA's guarantee of a FAPE, if parents who cannot afford or obtain an attorney are not permitted to prosecute an IDEA case *pro se* in court, such a rule, were it permitted to stand, would set up an untenable constitutional dilemma. Not only will the rights afforded children with disabilities and their parents under the IDEA be rendered meaningless and unenforceable, but the resulting scheme would violate the long-standing fundamental due process right of parents to control and direct the education and upbringing of their children.

Balancing the factors established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), in the present case requires that parents of a child with a disability be permitted to pursue their own and their children's rights under the IDEA in federal court without requiring that they obtain counsel. At stake is a fundamental private right; the risk of erroneous deprivation of that right is great; and any state interest is either congruent with the interest of the parents and their children (ensuring the child's education and that he or she becomes a productive citizen) or minimal at best

(ensuring the competent practice of law by a parent of a child with a disability who was already permitted to "practice law" at an earlier due process hearing). Prohibiting parents from asserting IDEA claims *pro se* unconstitutionally denies them, and their children, the right to a FAPE solely because those parents are unable to afford or otherwise obtain legal counsel.

ARGUMENT

A. This Court Has Long Recognized the Fundamental Due Process Right of Parents to Direct the Education and Upbringing of Their Children.

The Fifth Amendment to the United States Constitution provides that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The Fourteenth Amendment to the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Our judicial system has long recognized that the Due Process Clause guarantees more than fair process. *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). The Due Process Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (citing *Glucksberg*, 521 U.S. at 720); *see also Reno v. Flores*, 507 U.S. 292, 301-02 (1993) (referring to the Court's "line of cases which interprets the Fifth and Fourteenth Amendments' guarantee of 'due process of law' to include a substantive component, which forbids the government to infringe certain 'fundamental' liberty

interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest") (citations omitted).

The liberty interest at issue in this case – the interests of parents in the care, custody, control, and education of their children – is perhaps the oldest of the fundamental liberty interests recognized by our Constitution. Parental choices involving the rearing of their children and its relation to family life are among the most basic of constitutionally protected liberty interests. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). *Accord Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972); *Farrington v. Tokushige*, 273 U.S. 284, 298-99 (1927); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

More than 80 years ago in *Meyer*, this Court held that the "liberty" protected by the Due Process Clause includes the fundamental right of parents to "establish a home and bring up children" and "to control the education of their own." *Meyer*, 262 U.S. at 399-401. Two years later in *Pierce*, the Court expanded that interest to include the right "to direct the upbringing and education of children under their control." *Pierce*, 268 U.S. at 534-35. As explained in *Pierce*, "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535. In *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Court confirmed the constitutional aspect of a parent's right to direct and control the upbringing of children: "It is cardinal with us that the custody, care and nurture of the child *reside first in the parents*, whose primary function and

freedom include preparation for obligations the state can neither supply nor hinder." *Id.* at 166 (emphasis added).

Subsequent cases have expanded and explained the fundamental right of parents to determine the care, custody, and control of their children. In *Wisconsin v. Yoder*, this Court recognized the right of parents to manage their children's education. 406 U.S. at 231-33. The Court held that the rights of Amish parents to guide the religious training of their children trumped the State's admittedly significant interest in having children attend school until the age of sixteen. *Id.* As the Court explained, "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Id.* at 232. In *Glucksberg*, the Court recognized that "in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right[] . . . to direct the education and upbringing of one's children." *Glucksberg*, 521 U.S. at 720 (citing *Meyer* and *Pierce*). In effect, this Court has long and consistently recognized that parents themselves are the real parties in interest, who possess a constitutionally protected due process right, in matters concerning the appropriate education, placement, and treatment of their children. *See State v. Whisner*, 351 N.E.2d 750, 769 (Ohio 1976) ("[T]he right of a parent to guide the education . . . of his or her children is indeed a 'fundamental right' guaranteed by the due process clause of the Fourteenth Amendment.").

Thus, under this Court's long-established due process jurisprudence, when parents sue on behalf of their children under the IDEA, it is their own fundamental, constitutional rights that they are invoking – or, at the very least, those rights are held jointly by parents and their child. Under this Court's extensive precedents, the Due Process Clause protects the fundamental right of parents to evaluate, make decisions, and stridently defend the care, custody, control, and education of their children. Because Parma's objections to *pro se* representation in this case not only threaten to undermine the objectives of the IDEA, but also deprive the parents of children with disabilities of constitutionally protected due process rights, this Court should reject those arguments and reverse the judgment below.

B. Requiring Parents of a Child with a Disability to Obtain Counsel to Enforce Their Own and Their Child's IDEA Claims in Court Deprives Them of Their Right to Equal Access to the Courts.

The Sixth Circuit's decision in *Winkelman*, and in *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753 (6th Cir. 2005), on which the *Winkelman* Court relied, prohibits non-attorney parents of children with disabilities from pursuing *pro se* appeals of administrative decisions under the IDEA in federal court. The Winkelmans, and all non-attorney parents of children with disabilities, are thereby summarily deprived of the constitutional right to defend and protect their fundamental interest in the upbringing and education of their children. The proper test for "determining the procedures that are necessary to ensure that a citizen is not 'deprived of life, liberty, or property, without due process of law' is the test that [this Court]

articulated in *Mathews v. Eldridge*." *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (citation omitted). *Mathews* requires a careful balancing of three factors.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. Balancing these factors in the present case requires that parents of children with disabilities be permitted to pursue their own and their children's rights under the IDEA in federal court without meeting the requirement that they obtain counsel.

1. The private interest affected is a fundamental liberty interest.

The private interest implicated in the present case is of the highest constitutional order. Parents have a fundamental right to determine the care, custody, and control of their children – including the right to make decisions about their child's education. *See* Section A, *supra*. Parental rights in the upbringing of children "are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (citation omitted). This factor weighs heavily toward permitting parents to pursue relief *pro se* in federal court and can only be overcome by a compelling

fundamental government interest, which does not exist in this case.

2. The risk of erroneous deprivation is great and permitting parents to represent their children under the IDEA reduces this risk.

The second factor under the *Mathews* test examines the risk of erroneous deprivation and the value of additional procedural safeguards. Under the Sixth Circuit's holding, parents of a child with a disability are completely deprived of the opportunity to defend their own and their child's fundamental due process rights. The Sixth Circuit's jurisprudence in *Winkelman* and in *Cavanaugh* slams the courtroom door and prevents the parents from pursuing any form of relief in federal court unless they fortuitously have the funds to obtain counsel or can obtain *pro bono* representation. *See Cavanaugh*, 409 F.3d at 757 ("Therefore, *any* right on which the Cavanaughs could proceed on their own behalf would be derivative of their son's right to receive a FAPE, and wholly dependent upon the Cavanaughs' proceeding, *through counsel*, with their appearance on Kyle's behalf.") (emphasis added).

By refusing to recognize the parents' fundamental right to control their children's education, the Sixth Circuit guarantees deprivation of this right in every IDEA case. This error can be corrected simply by re-opening the courtroom door and granting parents the right to proceed *pro se* and on behalf of their child with a disability when appealing an administrative decision under the IDEA. These additional procedural safeguards impose no additional costs on the State and merely require that the parents of a child with a disability be given the same procedural safeguards as every other party alleging a

deprivation of constitutional rights. The courts need not appoint counsel, nor lower the procedural threshold for pursuing a civil action, but only permit parents to appear and plead the appeal.

3. The State's interests are insufficient to overcome the fundamental private right implicated.

None of the possible State interests implicated in permitting parents to pursue IDEA appeals *pro se* are sufficient to justify infringing a fundamental liberty interest. Admittedly, the State has an interest in ensuring that children with disabilities receive a FAPE and become productive members of society. In this regard, however, the interests of the State and the parents are identical. Justice Brandeis once noted the value of oversight and disclosure for corporations, declaring that "[s]unlight is said to be the best of disinfectants." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting Louis Brandeis, *Other People's Money* 62 (National Home Library Foundation ed. 1933)). Similarly, shining the light of federal court review on school district decisions can serve only to further the goal of ensuring a FAPE for children with disabilities.

The State may also claim a financial interest in limiting parents' access to pursue *pro se* actions in federal court for review of IDEA appeals. This Court has acknowledged a State's legitimate interest in offsetting the costs of its court system. *M.L.B.*, 519 U.S. at 116 (citing *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973)). Despite this legitimate state interest, the *M.L.B.* Court held that cost could not justify prohibiting *in forma pauperis* appeals in parental status termination cases. *Id.* at 124. Unlike *M.L.B.*, where the State was forced to fund the cost of record preparation

fees for the indigent appellant, the Winkelmans simply wish to pursue their claims by appearing *pro se*, at no cost to the state or federal government or to any other party. Nor is this a question of requiring court-appointed counsel. Thus, the State's financial interest, while a legitimate one, is insufficient to limit parents' ability to protect their fundamental rights.

Another state interest that will be claimed is the interest in regulating the practice of law. *See, e.g.*, *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 434 (1982); *Leis v. Flynt*, 439 U.S. 438, 442 (1979). This state interest is not, however, absolute. The Ohio Supreme Court acknowledges that in certain circumstances the interest in requiring an attorney "is outweighed by other important considerations." *Cleveland Bar Ass'n v. CompManagement, Inc.*, 818 N.E.2d 1181, 1189 (Ohio 2004). The Court, which exercises plenary power to regulate the practice of law in Ohio, recognizes that "in certain limited settings the public interest is better served by authorizing laypersons to engage in conduct that might be viewed as the practice of law." *Id.* (upholding administrative rules and tradition authorizing third parties to represent employers and employees during worker compensation hearings). The public interest surely requires the State to relax the traditional prohibition against unauthorized practice in this narrow legal context, where its enforcement deprives a parent and child of individual fundamental rights. *See, e.g.*, *In re Primus*, 436 U.S. 412, 439 (1978) (free association); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977) (free speech); *NAACP v. Button*, 371 U.S. 415, 438-40 (1963) (free association).

The primary concern that legitimizes the State's interest in regulating the unauthorized practice of law is

protecting the public from poor representation in court. *See, e.g.*, *Bates*, 433 U.S. at 361. Such concern for the public welfare is not implicated by parents acting *pro se* to defend their own fundamental rights in federal court. The Winkelmans are not offering representation to members of the general public; they are merely seeking to represent themselves. The State may attempt to argue it is protecting the interest of a child with a disability in receiving competent legal counsel. Such a claim is not credible because the State's position ensures that the child never has a day in court, much less effective legal representation.

The State's interest in regulating the practice of law is further minimized in this case by the fact that parents are permitted to represent their child with a disability at the administrative due process hearing. Under the IDEA, parents have an absolute statutory right to pursue issues in a due process hearing and to make those decisions without legal counsel. 20 U.S.C. § 1415(f), (h). If parents are going to shortchange their child inadvertently by pursuing IDEA claims without an attorney, they will do so at the due process hearing when they make critical decisions about what evidence to present and how to cross-examine the school district's witnesses. Lodging a claim in court following exhaustion of the parents' administrative remedies does not engender *de novo* review; the district court considers the administrative record and may, in its discretion, take additional evidence. 20 U.S.C. § 1415(i)(2)(b). An attorney who appears for the first time at the district court may not be able to cure mistakes made by the parents of a child with a disability at the due process hearing. Given that parents may provide representation to their child with a disability at the due process hearing, the

State's interest in "protecting" the public from a parent's representation of his or her child with a disability at a subsequent court proceeding is minimal, if one exists at all.

In fact, permitting parent appearances and *pro se* representation of their child with a disability is akin to permitting parents to pursue claims for social security income ("SSI") benefits for their children in federal court. *See Machadio v. Apfel*, 276 F.3d 103, 107 (2d Cir. 2002); *Harris v. Apfel*, 209 F.3d 413, 416 (5th Cir. 2000). There is no rational basis for the State to permit parental representation in SSI cases in the district court and to deny the same right in IDEA cases. Concluding that parents may appear in IDEA cases for their child does not challenge the State's interest in regulating the practice of law. *See Sperry v. Florida*, 373 U.S. 379, 383 (1963). Rather, it recognizes a well-established constitutional principle that state law is preempted when it effectively imposes an obstacle to rights guaranteed by federal law. *See Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991).

There are less restrictive means by which the district courts can protect the State's interest in protecting the public without infringing parents' fundamental right to control the education of their children. The district courts may, for example, ensure appropriate conduct by requiring parents appearing *pro se* to observe and comply with the ethical rules applying to the legal profession. The district courts also could employ in IDEA cases the same informal procedures they use to secure representation for *pro se* litigants in civil rights cases. District courts have decades of experience in seeking private attorneys to represent *pro se* parties in civil rights cases. Private attorneys may accept these cases at the request of the court and provide

representation on either a *pro bono* basis or in reliance on a prevailing party fee-shifting statute. *See, e.g.*, 20 U.S.C. § 1415(i)(3) (permitting the prevailing party to obtain attorneys' fees). Of course, the district court would exercise its discretion in choosing to appoint counsel in any particular IDEA case, or it could be unsuccessful in securing private counsel. But even if counsel is not secured, due process requires that *pro se* parents must be permitted to proceed. Neither the parent and child, nor the State, will be worse off if the parent and child proceed *pro se* than if the district court dismisses their claims for lack of the ability to secure counsel.

Because the IDEA was intended to ensure the full participation of parents in all educational decisions involving their children, *see Honig v. Doe*, 484 U.S. 305, 311, 324 (1988), and the Sixth Circuit's holding unquestionably subverts a parent's right to challenge such a decision in court, it cannot stand. Prohibiting parents from asserting IDEA claims *pro se* will result in the denial to many students with disabilities of the right to receive a FAPE solely because their parents are unable to afford or otherwise obtain legal counsel. By denying parents the right to represent their children in federal court, the courts are in fact depriving children with disabilities of their day in court. Unless the decision below is set aside, IDEA's purpose – giving parents the ability to participate fully in charting their children's educational destiny – will be thwarted, and the rights of virtually every parent of a child with a disability will be rendered unenforceable.

CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the Sixth Circuit and permit the Winkelmans to present *pro se* the IDEA claims concerning their child's education.

Respectfully submitted,

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